



## **Terms and Conditions of Sale**

### **Ecka Granules of Australia Pty Ltd.**

**These terms and conditions of sale apply to all sales made by or on behalf of Ecka Granules of Australia Pty Ltd. (CAN 080 694 935) (“Seller”) and you (“Customer”).**

#### **GENERAL CONDITIONS OF SALE**

1.1 These General Terms and Conditions of Sale (Conditions) shall apply to the sale of all products (products) by Ecka Granules Australia Pty Ltd ACN 080 694 935 (Seller) to you (Customer).

1.2 These Conditions and any supply agreement (Supply Agreement) and any product specifications included in the Supply Agreement or provided separately (Specifications) shall constitute the entire agreement (Agreement) between Seller and the Customer with respect to the supply of the products described in the Supply Agreement and Specifications, as the case may be, and in respect of the quantity of the products stated in the Supply Agreement.

1.3 A variation of these Conditions is valid only if it is in writing and specifically included in any Supply Agreement.

1.4 If there is any conflict between these Conditions and the provisions of the Supply Agreement and the Specifications, the provisions of the Supply Agreement and the Specifications shall prevail but only to the extent of the conflict.

1.5 All other terms, conditions, warranties and any other terms contained in the documents of the Customer, including but not restricted to terms and conditions, forms and purchase orders of the Customer are excluded except to the extent they are expressly agreed to in writing by Seller and included in this Agreement.

1.6 Products are sold and delivered on the basis of Incoterms 2010 edition – ICC Official Rules for the Interpretation of Trade Terms as varied and supplemented in this Agreement.

1.7 The application of the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980 (CISG) and any statute or law enacting or giving force to the same or any part thereof is excluded.

#### **2. ORDERS**

2.1 All orders for any products must be in writing.

2.2 No Customer purchase order shall be deemed accepted unless confirmed or executed by Seller by shipping the products. The Agreement shall not commence until after Seller has confirmed the Customer's purchase order. Should any delivery be made by Seller without prior confirmation, Seller's invoice shall be deemed to be the confirmation of the order.

### **3. PRICE**

The price (including any premium) for the products to be supplied to the Customer by Seller shall be the price set out in the Agreement.

### **4. GST AND OTHER TAXES AND DUTIES**

4.1 The price charged for the products shall be exclusive of GST or VAT (if any) and all other applicable taxes and duties which must be added to the price at the applicable legal rate, including tariffs, imposts or any other fees imposed by a national, supranational, regional or local governmental authority. Customer acknowledges and agrees that it is responsible for all such taxes and charges described above.

4.2 Where any GST or VAT (if any) or other applicable tax applies to a supply made by Seller under the Agreement, Seller may recover an additional amount from the Customer on account of that tax.

4.3 For the purpose of this clause 4, GST has the same meaning as in the GST Law, and GST Law has the same meaning as in the A New tax System (Goods and Services Tax) Act 1999 (Cth). Words defined in the GST Law have the same meaning in this clause 4.

### **5. DELIVERY**

5.1 Products shall be delivered in accordance with the relevant INCOTERM (INCOTERMS 2010) specified in the Supply Agreement.

5.2 Seller shall use reasonable endeavours to deliver the products by the date specified in the Agreement as being the delivery date (Delivery Due Date).

5.3 Seller is not liable for any loss or damage (including consequential loss or damage) accruing to the Customer as a result of late delivery. Any claims of the Customer against Seller for default related to delay are expressly excluded.

5.4 The Customer must still accept and pay for the products even if Seller delivers late.

5.5 Seller may deliver the products in instalments. Each instalment will be treated as a separate delivery under this Agreement. If the Customer does not pay for an instalment, Seller may treat the non-payment as a breach of contract relating to the other instalments.

5.6 Subject to clause 5.5, if Seller fails to effect delivery of an instalment within sixty (60) days from the Delivery Due Date, other than as a result of any of the reasons specified in clause 13 (Force Majeure), the Customer may cancel the instalment that has not been delivered.

5.7 Where delivery is by instalments, Seller's failure to deliver any instalment on time or at all will not entitle the Customer to repudiate or cancel this Agreement with regard to any other instalments remaining to be delivered.

5.8 Unless the Agreement specifies the means by which the products are to be transported, products shall be transported by means determined by Seller in its absolute discretion.



5.9 If the Customer does not collect the products, or provide adequate delivery instructions within fourteen (14) days of request by Seller, or Seller agrees to a request by the Customer to delay delivery, Seller may charge for storage. The Customer must pay such storage charges monthly at commercial rates. The products will be stored at the Customer's risk.

## **6. PACKAGING**

6.1 Unless the Agreement specifies the way in which the products are to be packaged, the products shall be packaged in the way determined by Seller in its absolute discretion.

6.2 Packaging will be charged at cost price and is not taken back, unless required by law. The cost of packaging is to be paid when the price is due.

6.3 If the delivery of the products requires Seller lending containers, such containers shall be returned to Seller free of charge. Containers not returned to Seller within a period of six (6) months shall be charged to the Customer according to the terms usual in the trade.

## **7. PAYMENT**

7.1 Unless otherwise agreed in writing, the Customer must pay Seller for the products purchased either: (a) by the date specified as the due date for payment in the Supply Agreement (Payment Due Date); or (b) immediately if Seller considers that an event specified in clause 14.1 has occurred or is likely to occur.

7.2 If the Customer fails to pay any invoice issued by Seller in accordance with the Agreement by its due date for payment, default interest shall be charged on the overdue payment at the rate of 3 month LIBOR plus 6% per annum accruing on a daily basis from the Payment Due Date until full payment is made of the overdue payment and any accrued interest, reserving to Seller the right to claim for any further damages caused by the Customer's default and without prejudice to any other right or remedy Seller may have.

7.3 All deliveries are based on the Customer's creditworthiness. Seller reserves the right to reduce the credit or payment terms in the Agreement or to require the Customer to provide advance payments or security in the form of a letter of credit, guarantee or other security (which security shall be in form and substance and in an amount acceptable to Seller) at any time on written notice to the Customer, if Seller determines in its sole discretion that any such security is required as a result of any negative change to the Customer's financial condition or creditworthiness or if the Customer fails to pay any amounts due by the Payment Due Date. If the Customer in such circumstances does not provide advance payments or reasonable security, Seller shall be entitled to withdraw from the Agreement.

7.4 The Customer must pay all expenses incurred by Seller in enforcing Seller's rights under this Agreement.

## **8. WARRANTIES AND DESCRIPTIONS**

8.1 The Customer must accept the products supplied under the Agreement if it is in accordance with the description stated in the Agreement and within the tolerances with regard to quantity, weight, dimensions,



chemical composition, physical properties and finish specified in, as the case may be, the Supply Agreement and the Specifications, or if not so specified, as normally regarded as being commercially acceptable.

8.2 Manifests and certificates of analysis provided by Seller will be deemed to be conclusive evidence of the matters stated in this Agreement.

8.3 Seller warrants only that the products supplied under the Agreement will conform to the description stated in the Agreement (subject to the tolerances referred to in clause 8.1) and that it will give good title to the products. Subject to any rights which cannot be excluded by law, all other warranties, conditions, liabilities or representations (whether express, implied, statutory, or otherwise) as to the quality of the products or as to the accuracy of information, advice or other services concerning the products, or the products fitness for purpose (whether or not made known to Seller) are expressly excluded. The Agreement will not be construed as a sale by sample.

## **9. QUANTITY DISCREPANCY**

9.1 If the total quantity of products delivered pursuant to the Agreement is less than the total quantity the Customer ordered under the Agreement, the Customer must notify Seller in writing of the shortfall within seven (7) days after the last delivery. Otherwise, Seller will take it that the correct quantity of products has been delivered and the Customer must accept the products and pay for them in full despite the shortfall.

9.2 If the total quantity of products delivered under the Agreement is more than the amount the Customer ordered under the Agreement, the Customer must immediately inform Seller in writing and Seller is entitled to charge the Customer for the excess or recover the excess from the Customer.

## **10. CLAIMS**

10.1 Any claim which the Customer may have against Seller under this Agreement is deemed to be waived unless the Customer gives written notice of that claim to Seller within fifteen (15) days after the products is unloaded at the port of discharge or place of delivery and gives Seller a reasonable opportunity to investigate the claim. Any claims will only be considered if the products are still in the condition received, except for necessary measures of examination.

10.2 Claims based on material defects are subject to a limitation period of 12 months.

10.3 Notwithstanding any provision of this Agreement to the contrary, Seller's total aggregate liability to the Customer in relation to shipment of the products, whether arising out of or in connection with this Agreement, under statute, in tort (for negligence or otherwise) or any other basis in law or equity shall not exceed the purchase price of that shipment paid by the Customer. Seller's liability and the Customer's exclusive remedy shall be expressly limited to Seller's choice of:

- (a) the repair of the defective products;
- (b) the replacement of the defective products with conforming products; or
- (c) the repayment of the purchase price paid by the Customer for the shipment of the defective products.



10.4 Replacement of defective products or repayment of the purchase price paid by the Customer for those products will be made only upon return of the defective products to the Seller, only after inspection by Seller, and receipt by Customer of definite shipping instructions from the Seller. Freight relating to the return of defective products shall be paid by the Customer. Freight shall only be reimbursed in the case of a justified notification of a defect in the products.

10.5 Notwithstanding any provision of this Agreement to the contrary, to the maximum extent permitted by law, Seller is not liable for any consequential loss, loss of opportunity, loss of revenue, loss of profit or anticipated profit, loss of contract, loss of goodwill arising from business interruption, special or contingent losses or damages whether arising out of or in connection with this Agreement under statute, in tort (for negligence or otherwise) or any other basis in law or in equity.

10.6 The Customer must exercise reasonable endeavours to mitigate any losses suffered, sustained or incurred which might be the subject of a claim by the Customer against Seller under this Agreement.

## **11. RESERVATION OF TITLE**

11.1 Title to the products will remain with Seller and not pass to the Customer until the Customer pays all moneys it owes to Seller under the Agreement. Prior to such time, the Customer holds the products as bailee only and if required by Seller, will store the products in such manner that they are clearly identifiable as the property of Seller and will hold any proceeds of sale of the products on trust for Seller. Seller nevertheless grants to the Customer the right to blend comingle, treat or process the products as of delivery. If the Customer manufactures any products from blending, comingling, treating or processing the products before making payment to Seller, the Customer will hold its right to receive payment from its customer for the manufactured products on trust for Seller.

11.2 The Customer acknowledges that Seller may register a purchase money security interest in the products on the Personal Property Securities Register (PPSR) to secure payment in accordance with the Agreement and that for that purpose Seller may be required to file financing statements and other information to evidence Seller's ownership of the products with a relevant authority. The Customer undertakes to Seller that upon request the Customer shall do all things reasonably required by Seller to ensure that such financing statements are properly filed and/or recorded to perfect Seller's security interest and to maintain the perfection of Seller's interest.

## **12. RISK**

The risk of damage to or loss of the products from all causes passes to the Customer from the time of delivery to the place of delivery. Seller is not liable to the Customer for any loss or damage or deterioration of the product after delivery, even if Seller arranges freight. Customer shall have the duty to maintain insurances on the goods against such risks from the time title passes until payment of the full purchase price under the Agreement.

## **13. FORCE MAJEURE**



Seller is not liable for any failure to perform the Agreement to the extent and for so long as its performance is prevented or delayed because of:

- (a) circumstances outside of Seller's control (including without limitation, operational breakdowns and interruptions of transport, embargos, natural disasters, fires, floods, lack or shortage of manpower, raw materials, fuels or energy, strikes, lockouts, political unrest, mobilisation, revolution interventions by authorities, accidents) and other cases of force majeure that impede production or shipping completely or in part;
- (b) failure or temporary or permanent closure of Sellers plant;
- (c) failure of a supplier to Seller;
- (d) change of control of Seller's plant or any corporate action or divestment, each a Force Majeure Event.

13.2 If Seller is prevented hindered or delayed from or in supplying the products in accordance with the Agreement by a Force Majeure Event, Seller may at its option:

- (a) suspend deliveries while the Force Majeure Event continues; or
- (b) if Seller has insufficient stocks to meet its commitments, apportion available stocks between its customers as it decides.

## **14. CANCELLATION**

14.1 Seller may by written notice immediately cancel the Agreement for the delivery of any future instalment of the products and resell the products and/or demand immediate payment of all amounts outstanding (whether or not then due and payable):

- (a) If the Customer fails to perform or observe any material term of this Agreement (including payment terms);
- (b) If the Customer in the reasonable opinion of Seller has unsatisfactory credit worthiness;
- (c) If the Customer has any of its property seized by a holder of any security;
- (d) If an Insolvency Event occurs with respect to the Customer.

For the purpose of this clause, an Insolvency Event shall mean, if the Customer enters into an agreement or arrangement with its creditors, or is unable to pay its debts as and when they fall due, or being an individual, commits and act of bankruptcy, or being a company resolves or is ordered to be wound up or have a liquidator, administrator, receiver, receiver and manager or official manager appointed for all or part of its assets.

14.2 Upon the happening of an event listed under clause 14.1, Seller shall also have the right to, as the case may be:

- (a) cancel the Agreement as to any future delivery and re-sell the products;
- (b) suspend or withhold any future deliveries or shipments until the event listed under clause 14.1 has been corrected;
- (c) setoff any amounts or obligations it owes or has toward the Customer with any amounts or obligations



the Customer owes or has toward Seller in connection with this Agreement;  
(d) recover from the Customer any other losses or damages (including reasonable attorney's fees) but excluding any other indirect, incidental, consequential, special, exemplary or punitive damages, incurred in connection with the event listed in clause 14.1.  
(e) any other remedies Seller may have whether by agreement operation of law or otherwise.

14.3 Seller may, at its option, either extend the time of shipment (and make alternative delivery or shipping arrangements) or cancel the Agreement if Seller does not receive in ample time to enable it to make delivery or shipping arrangements for the delivery of the products:

- (a) marking and shipping instructions from the Customer;
- (b) import certificates and documents from the Customer required to obtain governmental licences and authorisation in order to make shipments; and
- (c) advice that an irrevocable letter of credit (if required) has been issued by a Bank and upon terms acceptable to Seller. A draft of such irrevocable letter of credit must be provided to Seller for approval at least fourteen (14) days prior to its issuance.

14.4 Upon cancellation of the Agreement by Seller pursuant to clauses 14.1 or 14.2, Seller will be entitled to stop the delivery or shipment or further delivery or shipments of the products and recover from the Customer any sum due from the Customer at the time of cancellation of the Agreement and any loss or damage suffered by Seller as a result of cancelling the Agreement, or if the products have been produced specifically for the Customer, or is in the process of being produced, the Customer shall pay to Seller liquidated damages for the full Agreement price thereof and any costs incurred by Seller.

14.5 The Seller may cancel this Agreement by giving written notice if the products remain undelivered or uncollected after thirty (30) days from when Seller informs the Customer that the products are ready for collection.

14.6 The Customer will not be entitled to any damages because of cancellation of this Agreement by Seller under clauses 14.1 to 14.5 (inclusive).

## **15. SOURCE OF PRODUCTS**

If the Agreement does not state a specific source of the products, Seller may declare the source of the products and this Agreement will become a contract for the supply of products from that source. Seller may change the source of the products at any time during the Agreement for any reason, insofar as the products will be sourced from one or more of Seller's Affiliates. For the purpose of this Agreement, Affiliate means any body corporate directly or indirectly Controlled by, under common Control or Controlling Seller. For this purpose Control shall mean the ownership directly or indirectly of greater than 50% of the shares entitled to vote at a general meeting of a body corporate.

## **16. INTELLECTUAL PROPERTY**

16.1 Any documents or information (in any medium of form) such as drawings, plans and specifications that Seller submits to the Customer or which Seller makes the Customer aware of is considered to be





confidential and proprietary information of Seller and remains the property of Seller. The Customer must treat the information contained in those documents as strictly confidential. The Customer must use the documents and information only in the manner and for the purpose permitted by Seller. The Customer must not use the information in any way to the advantage of the Customer and to the detriment of Seller.

16.2 By purchasing the products, the Customer does not gain any licence or right under any of Seller's intellectual property (such as patents, registered design, trademarks or trade names, copyright or confidential information) for any purpose.

16.3 Seller is not obliged to disclose the methods or techniques used in production.

16.4 If Seller supplies product under the Agreement according to the Customer's instructions or specifications, the Customer warrants that its instructions or specifications will not cause Seller to infringe any patents, registered designs, trademarks or trade names, copyright or confidentiality rights in the performance of the Agreement.

## **17. INDEMNITY**

17.1 The Customer agrees to release, hold harmless, indemnify and defend Seller against all actions, claims, demands, liabilities, losses, damages, costs, charges and expenses suffered or incurred by Seller as a result of or in connection with any of the following:

17.2

- (a) Seller's compliance with the Customer's instructions regarding the products;
- (b) the Customer's failure to provide or display safety information on or relating to the products, comply with laws relating to the use, sale, marketing, labelling or marking of the products or detect and bring to Seller's attention matters for which Seller may become liable, whether for negligence, under legislation or otherwise or otherwise comply with any laws, rules, standards or regulations applicable in relation to the products or the use of the products;
- (c) any statement which the Customer makes about the products without Sellers' written approval;
- (d) the use of products by the Customer or a third party;
- (e) the Customer's negligence, wilful misconduct or breach of this Agreement; or
- (f) any breach by the Customer of the warranty set out in clause 16.4.

## **18. DISPUTE RESOLUTION**

18.1 Any dispute arising out of or in connection with this Agreement which cannot be settled amicably, between the parties may be referred by either party to the International Chamber of Commerce (ICC) or the Australian Commercial Disputes Centre (ACDC) and will be finally settled under the rules of conciliation and arbitration of the ICC or the ACDC by one or more arbitrators appointed in accordance with those rules. Any arbitration will be held in Hobart, Tasmania or in any other place, country, state or territory solely at Seller's option.

18.2 Despite the existence of a dispute, the Customer must continue to perform its obligations under the Agreement.





18.3 Either party may commence court proceedings relating to any dispute arising from the Agreement at any time where that party seeks urgent interlocutory relief.

## **19. GENERAL**

### **19.1 Notices**

(a) Any notice under the Agreement must be in writing.

(b) Any notice to be given by the Customer to Seller pursuant to the Agreement shall be sent to Ecka Granules Australia Pty Ltd, 4523 East Tamar Highway, Bell Bay, Tasmania, 7253, Australia, (Attention: General Manager).

(c) Any notice to be given by Seller to the Customer pursuant to the Agreement shall be sent to the Customer's registered office address or any other address as notified from time to time.

(d) Notice shall be regarded as properly given if sent in writing and shall be deemed to have been served on delivery if sent by hand, 72 hours after dispatch if sent by post. All notices shall also be emailed or sent by facsimile to the other party for the purpose of being correctly served.

### **19.2 Variation**

Seller may vary these Conditions on written notice to the Customer.

### **19.3 Assignment**

The Customer may not without Seller's prior written consent assign, novate, sub-contract, transfer or otherwise dispose of its rights or obligations under this Agreement. Seller may without the consent of the Customer assign, novate, sub-contract or transfer the Agreement and any claims and receivables under the Agreement, in whole or in part.

### **19.4 Waiver**

A right of Seller may only be waived in writing signed by Seller. No other conduct of Seller (including a failure to exercise, or a delay in exercising the right), operates as a waiver of the right or otherwise prevents the exercise of the right. A waiver of a right by Seller on one or more occasions does not operate as a waiver of that right if it arises again. The exercise of a right by Seller does not prevent any further exercise of that right or of any other right.

### **19.5 Severability**

Any provision of the Agreement which is invalid or unenforceable in any jurisdiction is to be read down so as to be valid and enforceable in that jurisdiction, without invalidating or affecting the remaining provisions of the Agreement or the validity of that provision in any other jurisdiction.

### **19.6 Survival of indemnities**



Each indemnity provided by the Customer in the Agreement is a continuing obligation separate and independent from the Customers other obligations and survives the expiry or termination of the Agreement.

#### 19.7 Seller's rights

Any right that Seller may have under the Agreement is in addition to and does not replace or limit any other right that Seller may have.

#### 19.8 Governing Law and Jurisdiction

(a) The Agreement is governed by and is to be construed in accordance with the laws of the State of Tasmania, Australia.

(b) The parties accept and submit to the jurisdiction of the courts in that State and any courts which may hear appeals from those courts, and waives any right it might